Supreme Court, U.S.
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No. 96-991

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CHILDREN'S HEALTHCARE IS A LEGAL DUTY,
et al.,
Petitioners,

v.

BETTY D. MONTGOMERY,
Attorney General of Ohio,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the *Ex Parte Young* exception to the Eleventh Amendment allows the Ohio Attorney General to be sued, not because of any allegedly illegal action or inaction on her part, but solely because of her official position.

2. Whether Petitioners have standing when they have suffered no injury in fact, and any injury they may suffer is not caused by the conduct of Respondent and would not be redressed by a favorable opinion.

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STATEMENT OF THE CASE

Notwithstanding Petitioners' lengthy discussion of the merits of the case, the only issue before this Court is a jurisdictional one. Petitioners have brought this suit against the Attorney General of Ohio, not because of any past, current or threatened unconstitutional conduct on her part, but merely as a way to bind the State of Ohio. The Sixth Circuit correctly held that the Eleventh Amendment prevents a federal court from proceeding on this basis, and that the exception carved out in the Eleventh Amendment by *Ex Parte Young*, 209 U.S. 123 (1908), is inapplicable.

Petitioners imply that the Sixth Circuit's decision forecloses review of the statutes they challenge. This is incorrect for two reasons. First, Petitioners may seek review in State court, which is an adequate venue for their constitutional claims. *See Stone v. Powell*, 428 U.S. 465, 495 n. 35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and

to uphold federal law."). Second, Petitioners may seek federal court review by bringing this suit against the local county or city prosecutor. In fact, Petitioners initially did include local prosecutors in their suit. But when those prosecutors were dismissed by the district court, Petitioners did not appeal or cross-appeal that issue. Petitioners cannot use their failure to pursue the appropriate party as evidence that no federal review is available.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE SIXTH CIRCUIT'S ANALYSIS OF *EX PARTE YOUNG* IS IN ACCORD WITH THIS COURT'S DECISIONS.

The Eleventh Amendment prohibits suits against state officials when, as here, they are sued in their official capacity. *Kentucky v. Graham*, 473 U.S. 159, 167 (1985). *Ex Parte Young* provides an exception for suits seeking to prevent a state official from violating or continuing to violate the federal constitution. In the decision below, the Sixth Circuit correctly analyzed *Ex Parte Young* as allowing a federal court to enjoin a state official from *acting* unconstitutionally. The court thus concluded that the *Ex Parte Young* doctrine has no applicability to a case, such as the present one, where there has been no action or threatened action on the part of the state official. This analysis fully accords with the decisions of this Court.

Beginning with *Ex Parte Young* itself, this Court has consistently held that a federal court may enjoin a state actor

from violating or threatening to violate the constitution. Thus,

> individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, *and who threaten and are about to commence proceedings*, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a federal court of equity from such action.

209 U.S. at 155-156 (emphasis added). Adherence to this standard is necessary if the Eleventh Amendment is to have any vitality. Without the requirement that an official be connected to a statute and be acting pursuant to that statute, the Eleventh Amendment would offer no immunity protection to state officials such as the Attorney General. The Attorney General could be sued over her objections every time a plaintiff wanted to challenge the constitutionality of a statute, a result that would be convenient for the plaintiff, but

inconsistent with the Eleventh Amendment.[1]

The Court has been careful to adhere to this distinction in case after case. *See e.g.*, *Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992) (state attorney generals may be enjoined because they "had made it clear that they would seek to enforce the challenged" statute); *Dombrowski v. Pfister*, 380 U.S. 479, 483-484 (1965) (a federal injunction against a state prosecution would be justified where state officers threaten and are about to commence unlawful proceedings); *Terrace v. Thompson*, 263 U.S. 197, 214 (1923) ("Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravene the federal Constitution. . . ."); *Western Union Tel. Co. v. Andrews*, 216 U.S. 165, 166 (1910) (*Ex Parte*

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[1]Petitioners cite numerous statues which allocate certain criminal law enforcement duties to the Attorney General. Attorney General Montgomery agrees that she has many important law enforcement duties. This is not the issue before this Court. The issue before this Court is whether Attorney General Montgomery has acted, is acting or has threatened to act in violation of Petitioners' constitutional rights.

Young is applicable because prosecutors are charged with enforcement and have threatened and are about to commence enforcement of the unconstitutional act).

Petitioners attempt to avoid the conclusion that the decision below is in accord with this Court's precedents in two ways. First, they attempt to distinguish the present case because they seek declaratory as well as injunctive relief, relying on *Steffel v. Thompson*, 415 U.S. 452 (1974) and *Perez v. Ledesma*, 401 U.S. 82, 93 (1971) (Brennan, J., concurring in part and dissenting in part). Contrary to the Petitioners' assertions, these cases do not hold that the Declaratory Judgment Act, 28 U.S.C. § 2201, is a separate exception to the Eleventh Amendment. Indeed, the Eleventh Amendment's "jurisdictional bar applies regardless of the relief sought." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984). Nothing in the Declaratory Judgment Act establishes the requisite unequivocal intent of Congress to abrogate the Eleventh

Amendment, *Seminole Tribe v. Florida*, _____ U.S. ____, 116 S.Ct. 1114, 1123 (1996), even assuming Congress had the power to do so.

Petitioners also attempt to avoid the Sixth Circuit's conclusion that *Ex Parte Young* requires action on the part of the state official by citing numerous cases that have allowed facial challenges to state statutes even where there was no threatened enforcement. *See* Pet. at 16 (citing *e.g. Edwards v. Aguillard*, 482 U.S. 578 (1987); *Roe v. Wade*, 410 U.S. 113 (1973); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923)). None of these cases, however, contain any Eleventh Amendment analysis, let alone any analysis of *Ex Parte Young*.

In the last analysis, Petitioners have failed to assert that the Ohio Attorney General has, through either action or inaction, done anything to violate Petitioners' constitutional rights. Nor have Petitioners alleged that the Attorney General

is threatening to do so. Under these facts, the Eleventh Amendment does not allow a suit to be maintained against the Attorney General without her consent.

II. THERE IS NO MEANINGFUL LOWER COURT CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

The vast majority of lower courts have dismissed suits that were brought against a state Attorney General not because of any actual or threatened conduct, but merely because of his or her office. That, of course, is in accord with the Sixth Circuit's decision below.

For example, the decision below is in accord with the following circuit decisions. *1st Westco Corp. v. School District of Philadelphia*, 6 F.3d 108, 114 (3rd Cir. 1993) (Attorney General dismissed because, *inter alia*, he had not enforced or threatened to enforce the statute); *Sherman v. Community Consolidated School District 21 of Wheelington Township*, 980 F.2d 437 (7th Cir. 1992) (Attorney General must be dismissed from suit attacking constitutionally of

requiring Pledge of Allegiance in schools because "Plaintiffs apparently named the office of the Attorney General in an effort to obtain a judgment binding the State of Illinois as an entity, a step that Congress did not authorize when enacting 42 U.S.C. §1983, and that the Eleventh Amendment does not permit in the absence of such authorization.") *cert. denied*, 113 S.Ct. 2439 (1993); *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (Attorney General dismissed because "[a]bsent a real likelihood that the state official will employ his supervisory powers against Plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction."). *See also Shell Oil v. Noel,* 608 F.2d 208 (1st Cir. 1979); *Mendez v. Heller*, 530 F.2d 457 (2nd Cir. 1976). Numerous district courts have agreed. *Yniguez v. Mofford*, 730 F.Supp. 309, 311 (D. Ariz. 1990), *aff'd in part and rev'd in part, on other grounds*, 939 F.2d 727 (9th Cir. 1991), *cert. granted*, 116 S.Ct. 1316 (1996); *Akron Center for Reproductive Health v. Rosen*, 633 F.Supp. 1123, 1130 (N.D. Ohio 1986),

aff'd on other grounds, 854 F.2d 852 (6th Cir. 1988), *rev'd on other grounds*, 497 U.S. 502 (1990); *Gras v. Stevens*, 415 F.Supp. 1148, 1151 (S.D.N.Y. 1976); *Hatfield v. Williams*, 376 F.Supp. 212, 215 (N.D. Iowa 1974); *Coon v. Tingle*, 277 F.Supp. 304 (N.D. Ga. 1967).

Petitioners attempt to escape the weight of this authority by relying on two cases[2] where a court has found that *Ex Parte Young* does not require any conduct on the part of the defendant. The first is *Allied Artists Picture Corp. v. Rhodes*, 473 F.Supp 560 (S.D. Ohio 1979), *on reexamination*, 496 F.Supp. 408 (1980), *modified on other grounds*, 679 F.2d 656 (6th Cir. 1982). Obviously, *Allied* presents at most an intra-circuit conflict, not an inter-circuit

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[2]Petitioners also mistakenly claim that *Shell Oil* supports them. In *Shell Oil*, the First Circuit acknowledges that "the mere fact that an attorney general has a duty to prosecute all actions in which the state is interested" is not enough to make him a proper defendant in such action. 608 F.2d at 211. The issue was whether the Attorney General was indeed sufficiently connected and authorized to enforce the statute. The court found that issue to be undecided under state law, and declined to speculate on it. 608 F.2d at 212. The court did not hold that the Attorney General was a proper defendant.

conflict. More importantly, the issue presented in *Allied* -- whether a plaintiff can be completely foreclosed from obtaining any federal review of an allegedly unconstitutional statute -- is not presented here. In *Allied*, plaintiffs were attempting to enforce a statute that had no enforcement mechanism, and therefore, there was no state official connected to its enforcement. Had the Governor been allowed to assert his Eleventh Amendment immunity successfully, the statute could not have been reviewed in federal court. *Allied*, 679 F.2d at 665 n. 5.

Allied is distinguishable from the present case because in this instance, the local prosecutors are the state officials with plenary enforcement authority over the statutes at issue.[3] *See Children's Healthcare Is A Legal Duty v. Montgomery*, 92 F.3d 1412, 1416 (6th Cir. 1996); Pet. App. at 10a. Notably,

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[3]Petitioners are incorrect in suggesting that because they challenge an exemption to a criminal statute, the statute is "self enforcing." If a child were endangered and a prosecutor refused to bring an action because of this exemption, the prosecutor would be enforcing the exemption. Criminal statutes simply are not "self enforcing."

however, Petitioners have failed to challenge the district court's dismissal of the county and city prosecutor, and therefore, they are no longer defendants in this case. Thus, foreclosure of federal review results not from anything the Attorney General has done and not from the Sixth Circuit's correct analysis of *Ex Parte Young*, but from Petitioners' failure to cross-appeal the district court's decision.[4]

The second case relied on by Petitioners to demonstrate a split of authorities with regard to the correct interpretation of *Ex Parte Young* is *Doe v. Bolton*, 319 F.Supp. 1048 (N.D. Ga. 1970), *aff'd*, 410 U.S. 179 (1973). In *Doe*, the district court found that the State Attorney General's general law enforcement duties were a sufficient basis under *Ex Parte Young* to justify federal court

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[4]Moreover, Petitioners may always seek review of the validity of the statute in state court, which is fully capable of adjudicating federal constitutional rights. *Stone v. Powell*, 428 U.S. 465, 495 n. 35 (1976). And because Ohio has an appellate review which culminates in the Ohio Supreme Court, whose decisions are binding on the entire state, there is no need to sue separately in 88 counties.

jurisdiction. This finding was not a prerequisite for federal jurisdiction, however, as a local district attorney was also a party. Moreover, the *Ex Parte Young* issue was not raised in the appeal to this Court, and therefore, was not addressed in this Court's decision. The district court's decision is against the weight of the more recent precedents cited above. This single case, which at most creates a lopsided split of authority, simply does not present a conflict meriting review by this Court.

III. PETITIONERS LACK ARTICLE III STANDING.

The Writ should also be denied because Petitioners lack standing. In order to establish standing, Petitioners must demonstrate: (1) a concrete injury in fact; (2) a causal connection between the injury and Defendant's conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *United States v. Hayes*, ___ U.S. ____, 115 S.Ct. 2431, 2435 (1995); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). In the instant case,

Petitioners lack standing because the statute does not cause a concrete injury connected to the conduct of the Attorney General. *See Children's Healthcare*, 92 F.3d at 1420-25 (6th Cir. 1996) (Batchelder, J., concurring); Pet. App. at 17a-29a.

As Judge Batchelder correctly found, the only possible injury to Petitioners is that they may not be provided adequate medical care. *Children's Healthcare*, 92 F.3d at 1492; Pet. App. at 24a. This alleged injury is not, however, causally related to the conduct of the Ohio Attorney General, or even to the existence of the statute. Nor is a favorable decision likely to redress the alleged injury. In fact, this injury, if it exists at all, is traceable only to the parents or guardians of the affected children. In asserting that the alleged lack of care is a result of a statutory exemption, Petitioners are asking this Court to speculate about the motivations of persons not even a party to this suit. It is not, for instance, unreasonable to conclude that these persons'

conduct is guided not by the statute, but by their religion. If such is the case, the alleged injury is not traceable to the conduct Petitioners seek to have declared unconstitutional, nor would such a declaration remedy the alleged injury.

Petitioners also allege that their constitutional rights are violated because the statute prevents prosecution of their parents if their parents withhold medical treatment for spiritual reasons. This is not an "injury in fact" under Article III. Neither Petitioners nor anyone else has a right to have another person prosecuted for a crime. *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973); *Diamond v. Charles*, 476 U.S. 54 (1986). *See also*, *Children's Healthcare*, 92 F.3d at 1422 n. 5; Pet. App. at 23a, n. 5. Thus, even if Petitioners are potential victims of an unconstitutional statute, they have no right to have their assailants prosecuted, as distinct from any remedial right they may have against their assailants. Therefore, the State's lack of prosecution of this class of potential defendants cannot

invade a "legally protected interest," *Lujan*, 504 U.S. at 560-61, and cannot rise to the level of injury in fact.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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